

Protest of)	Date: June 20, 1990
COLORADO PIPING & MECHANICAL, INC.)	
Solicitation No. 072358-90-A-0010)	P.S. Protest No. 90-23

DECISION

Colorado Piping & Mechanical, Inc. ("CPM"), protests the contracting officer's award of a heat exchanger installation contract to Braconier Plumbing and Heating ("Braconier"). CPM claims it was unfairly disqualified by the contracting officer when it refused to provide certain requested financial information.

On January 22, 1990, the Denver Support Services Office issued Solicitation No. 072358-90-A-0010 requesting offers for the installation of a flat plate heat exchanger at the Denver Bulk Mail Center. Offers were received by February 12. Thereafter, the contracting officer held discussions through a series of meetings with, and letters to, offerors determined to be in the competitive range, including CPM. Best and final offers were requested in a letter dated March 26 from the contracting officer to the offerors, and further best and final offers were sought following an April 4 conference between the contracting officer and the offerors. Amendment 01 to the solicitation was issued on April 10; the amendment, which requested a third set of best and final offers by April 16, included an approved "or equal" product which had been submitted by CPM in its original offer. CPM acknowledged Amendment 01 and returned it to the contracting officer on April 11.

On May 2, CPM's President, John Labriola, met with the contracting officer to discuss CPM's proposal. At that meeting, the contracting officer asked CPM to provide profit and loss statements for the years May 1, 1987 - April 30, 1988, and May 1, 1988 - April 30, 1989. CPM refused to provide this information and was found nonresponsible by the contracting officer. Award was made to Braconier on May 3. CPM's initial protest letter, dated May 2, was received by the contracting officer on May 3, after award to Braconier.

In its May 2 protest letter, CPM questions the contracting officer's need for its profit and loss statements, which contain confidential information. CPM notes that the financial and qualification statements it provided to the contracting officer are the same data given for two other recent government contracts which it was awarded.^{1/} Considering

its net worth and bonding line, CPM believes the contracting officer's insistence on additional financial figures represents a subjective and unwarranted disqualification. CPM also protests the contracting officer's actions in disclosing the "or equal" heat exchanger model and manufacturer contained in CPM's initial offer to other offerors in Amendment 01. CPM claims this disclosure violates the intent of Section J.7 of the Solicitation, Restriction On Disclosure And Use Of Data.

The contracting officer filed his statement with this office on May 7. The contracting officer asserts that he requested CPM's profit and loss statements to determine if the contractor had adequate financial resources for the contract, since CPM's balance sheet indicated a loss of assets of more than 20% of CPM's net worth in 1989. CPM refused to provide further information. Because the contracting officer could not determine CPM's responsibility, as required by Procurement Manual (PM) 3.3.1, he believed he could no longer consider CPM's proposal for award. The contracting officer admits that CPM's "or equal" product information was included in Amendment 01. However, the contracting officer quotes Section J.7 of the solicitation, which explains that any offeror who does not wish the Postal Service to disclose its proposal data must mark the title page of its offer with specific language restricting the rights of the Postal Service to use such data. Since CPM's offer contained no indication that its proposal information should not be disclosed, the contracting officer asserts he was free to disclose this information to other offerors.

CPM wrote this office on May 10, reiterating the arguments in its original protest letter. CPM notes its proposed "or equal" heat exchanger would result in considerable cost savings for the project because it could be dismantled and transported more easily to the installation site. The protester again objects to the disclosure of this information to other offerors in Amendment 01. CPM also claims that Braconier, the awardee of the present contract, could not have provided the contracting officer with an income statement for the past two years because of a recent change in ownership of that company. CPM notes its final offer was lower than that of Braconier by some \$1,300. The protester criticizes the attitude of the Support Services Office and claims no logical reason exists for award to Braconier rather than CPM, implying that the contracting officer was prejudiced against it.

Discussion

PM 3.3.1 states that contracts may be awarded only to responsible contractors, and that a contractor must affirmatively demonstrate its responsibility to qualify for award. A contracting officer, in making a determination of a contractor's responsibility, must, among other things, obtain proof of adequate financial resources. PM 3.3.1 b.1; see Innovative Sales Brokers, Inc., P.S. Protest No. 89-41, August 31, 1989. Because of questions about CPM's financial losses in the previous year, the contracting officer had a reasonable concern whether CPM possessed adequate financial resources to perform the contract in question; therefore, he requested additional financial information from CPM.

When CPM refused to provide the information, the contracting officer determined it to be nonresponsible. That determination satisfies this office's well-established legal standard of review for a finding of nonresponsibility:

A responsibility determination is a business judgment which involves balancing the contracting officer's conception of the requirement with available information about the contractor's resources and record. We well recognize the necessity of allowing the contracting officer considerable discretion in making such a subjective evaluation. Accordingly, we will not disturb a contracting officer's determination that a prospective contractor is nonresponsible, unless the decision is arbitrary, capricious, or not reasonably based on substantial information.

Craft Products Company, P.S. Protest No. 80-41, February 9, 1981; see also Innovative Sales Brokers, Inc., *supra*; Lock Corporation of America, P.S. Protest No. 89-14, March 10, 1989; Marshall D. Epps, P.S. Protest No. 88-47, September 15, 1988; Fairfield Stamping Corporation, P.S. Protest No. 88-04, June 3, 1988.

Nothing in the record before us indicates the contracting officer acted arbitrarily or capriciously in requesting CPM's profit and loss statements. The protester's considerable losses in 1989 alerted the contracting officer to the possibility that CPM was experiencing significant financial difficulties. His request for the profit and loss statements gave CPM an opportunity to put these concerns to rest. CPM could have attempted to provide the contracting officer with some other explanation of its recent financial losses if the protester believed its profit and loss statements were too sensitive to reveal; however, CPM failed to offer any such explanation. Under these circumstances, the contracting officer had reason to declare CPM nonresponsible. Accordingly, that part of CPM's protest questioning the nonresponsibility determination must be denied.¹¹

CPM's protest also challenges the contracting officer's actions in revealing its "or equal" heat exchanger product information to other offerors in Amendment 01. This portion of the protest must be dismissed as untimely. PM 4.5.4 c. states that "[p]rotests of alleged deficiencies in the solicitation after the receipt of initial proposals must be received not later than the next closing date and time for the receipt of proposals." Amendment 01 required acknowledgement by April 16; CPM did not challenge the amendment's terms until May 2, the date of its initial protest letter. This office has no

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authority to rule on protests filed in an untimely fashion. Daniel J. Keating Construction Company, P.S. Protest No. 89-92, March 1, 1990; American Telephone Distributors, Inc., P.S. Protest No. 87-117, February 23, 1988. Accordingly, CPM's challenge to the contracting officer's actions in issuing Amendment 01 is dismissed as untimely.^{1/} The protest is denied in part and dismissed in part.

William J. Jones
Associate General Counsel
Office of Contracts and Property Law

[checked against original JLS 6/4/93]

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